IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

WEDNESDAY, THE 10TH OCTOBER 2007 / 18TH ASWINA 1929

WP(C).No. 29082 of 2007(K)

PETITIONER:

R.UNNIKRISHNAN, AGED 38 YEARS,
S/O.RAMAN NAIR, RESIDING AT PATTATHIL VEEDU,
KOTTAPPURAM, PARAVOOR, KOLLAM DISTRICT.

BY ADV. SRI.V.VENUGOPALAN NAIR
SRI.C.UNNIKRISHNAN (KOLLAM)

RESPONDENTS:

1.THE PARAVOOR MUNICIPALITY OF KOLLAM
DISTRICT, REPRESENTED BY ITS SECRETARY.

2.THE MUNICIPALO COUNSEL,
PARAVOOR MUNICIPALITY REPRESENTED BY ITS
CHAIRMAN.

*ADDL.R3.THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS,
TRIVANDRUM.

*ADDL.R3 IS IMPLEADED SUO MOTO AS PER THE ORDER
DATED 10.10.2007.

R1-R2 BY ADV. SRI.B.SURESH KUMAR

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 10/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PIUS C. KURIAKOSE,J.

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W.P.(C) No.29082 of 2007

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Dated: 10th October, 2007

JUDGMENT

It appears to me that there is an element of genuineness in the grievance which is voiced by the petitioner who is approaching this court in respect of the same subject matter, i.e., shop No.13/1, for the third time. In that shop room the petitioner's uncle and after him the petitioner used to conduct a fruit stall. The respondents are the Paravur Municipality and its Council. The conduct of the fruit stall in question was entrusted to the petitioner by his uncle who is hospitalised at the Regional Cancer Centre, Trivandrum for treatment for terminal condition of cancer. While the petitioner was conducting the fruit stall, the 1st respondent-Municipality issued a demolition notice to him, his uncle as well as to the owner of the shop room alleging that renovations had been effected without permission from the Municipality. Challenging that demolition notice the petitioner approached the Tribunal for Local Self Government Institutions and the Tribunal passed Ext.P2 order dated 8.2.2007 staying the demolition notice. The petitioner submits that even as Ext.P2 order was in currency, the petitioner was served with Ext.P3 notice dated

31.1.2007 directing the petitioner to stop the fruit stall within 24 hours of receipt of the notice on the reason that no licence had been obtained by him for conducting business. The petitioner points out that the Paravur Municipality came into being only in 1988 and that previously the area was within the limits of the Paravur Panchayat to which the Building Rules never applied. The shop room is about 75 years old and the petitioner and his uncle became obliged to renovate the same since an adjacent shop room which was also under the occupation of the petitioner's uncle had to be demolished at the request of the 1st respondent for widening the road. The Muncipality issued the demolition order presently stayed by Ext.P2 on extraneous considerations. Even Ext.P3 has been passed by the Municipality on extraneous considerations. Mandatory notification as contemplated by Section 447 of the Municipality Act making licence requirements obligatory for conduct of fruit stall has not been published. On receiving Ext.P3, the petitioner approached this court and this court passed Ext.P4 judgment directing the Municipality to take a decision on the application for licence which he had filed in the meanwhile for selling fruits. The question whether it is necessary to take out a licence for conduct of fruit stall in the absence of a notification

founded on rules framed by the Government under Section 447 of the Municipality Act was not considered by this court, though raised, it is pointed out. The petitioner submits that pursuant to Ext.P4, the 1st respondent passed Ext.P5 order rejecting the petitioner's application for licence. While Ext.P4 judgment directed the Municipality to dispose of the licence application within two weeks from the date of receipt of copy of the judgment, the Municipality passed Ext.P5 even before certified copy of the judgment was ready for issue to either of the parties. The petitioner therefore filed W.P.C.No.10178/07 challenging Ext.P5 and on being satisfied that the certified copy of Ext.P4 had not been issued to any of the parties even at the time when W.P.C.No.10178/07 came up for admission, this court granted interim stay of Ext.P5. The petitioner alleges that thereafter with the object of patching up the obscurities and filling up the lacunae in Ext.P5, the 1st respondent passed fresh order Ext.P6 dated 7.4.2007. On coming to notice Ext.P6, W.P.C.No.10178/07 was closed by this court passing Ext.P7 judgment under which the petitioner was given liberty to challenge Ext.P6. However in Ext.P7 this court recorded an assurance given by the Standing Counsel for the Municipality that for a period of three weeks from 5.9.2007 no

coercive action will be taken against the petitioner.

2. The petitioner submits further that that on receiving the certified copy of Ext.P7, the petitioner filed Ext.P8 appeal before the 2nd respondent-Council as provided under Section 509(1) of the Kerala Municipality Act. But even as Ext.P8 appeal is pending before the 2nd respondent-Council, on 28.9.2007 at about 3 P.M. two Health Inspectors of the 1st respondent-Municipality accompanied by a team of workers would rampage into the fruit stall and remove all the fruits stored therein to a jeep and a goods autorickshaw which had been brought by them. This was done in the absence of the petitioner and the action was carried out without notice to the petitioner. On noticing this high handed action, the neighbouring shopkeepers and the office bearers of the Merchants' Association intervened in the matter leading to police intervention. By the time when police reached the spot, the autorickshaw which has been loaded with fruits had disappeared from the scene and though requested by the petitioner who would come to the spot by this time, the Muncipal Officers were reluctant to prepare an inventory of the articles which were removed but would only return three cases containing fruits which had been stored in the jeep. Ext.P10 police complaint was

submitted readily by the petitioner complaining of the atrocities. Thereafter anticipating implementation of Ext.P6 in spite of pendency of Ext.P8, the petitioner filed Ext.P11 stay petition. Ext.P11 was filed on 29.9.2007. On the next day, i.e. on 30.9.2007 the petitioner did not open the stall since his daughter had to undergo a surgery and also since the petitioner was hopeful of interim orders on Ext.P11. But to the petitioner's surprise, the very same Health Officers of the Municipality came at 3.30 P.M. and overlocked the shop room affixing a notice thereon that the room is sealed by the Municipality in implementation of Ext.P6 order.

3. The petitioner alleges that he is being hounded by the Municipality and that the action of the Municipality is motivated by political interests and also by the undue influence which is being exerted by the owner of the building situated behind the petitioner's shop room on the municipal officials. The petitioner is a small time merchant whose shop room is just 50 Sq. feet in area. The building which has been constructed behind the petitioner's room is a multi-storied one which stands to gain by way of additional road frontage if the petitioner's shop room is removed from its present site. On various grounds, the petitioner prays for the following reliefs:

"1. To issue a writ of certiorari calling for the records pertaining to Ext.P6 and quash the same.

2. To issue a mandamus direction or order directing the 2nd respondent Council to dispose of Ext.P8 appeal and P10 interlocutory application for stay within a time frame in accordance with law and on merits after providing an opportunity of hearing to the petitioner or his representatives.

3. To issue a writ of Mandamus direction or order to the 1st respondent to remove the locks and seal put up on the shop room of the petitioner forthwith so as to enable him to carry out his business till the matter is finally settled or in the alternative to avoid further delay, permit the petitioner to remove the locks and seal put up by the 1st respondent on his shop room.

4. To grant any other reliefs which this Honourable Court may deem fit and proper considering the nature and circumstances of the case and

5. To declare that the petitioner is not bound to take licence for the conduct of trade in fruits since there are no rules as contemplated in Section 447 of the Munkicipalities Act."

4. The Municipality has filed a detailed counter affidavit. It is

pointed out therein that the main ground raised in W.P.C.No.5328/07 (Ext.P4) was that the Paravur Municipality has not published a notification in terms of Section 447(1) of the Municipality Act and that it was on production of that notification dated 26.2.1996 that this court passed Ext.P4 dismissing the Writ Petition. It is pointed out that the petitioner and his uncle have filed a civil suit against the Municipality which is pending. Noticing the stay order passed by this court, the Municipal Council on 21.2.2007 resolved to take further steps only after the stay period is over. The counter affidavit points out that it was without obtaining permission from the Municipality that the petitioner reconstructed separate shop rooms having door Nos.13/1 and 13/2 as one shop room and installed rolling shutters. Since that act was in gross violation of the statute and the rules, the Municipality issued orders to demolish the constructions which are now stayed by the Tribunal. Without regularising those illegal constructions, the Municipality will not be justified in issuing licence. It is also pointed out that the shop room is situated at the corner of Paravur junction and it is a bottleneck to the traffic. Ext.R1(b) photographs are relied on in this context. The counter affidavit further points out that it was only after the expiry of the time granted

by this court in Ext.P7 judgment and in the absence of any order of stay issued by any other authority extending the stay that the Municipality took the decision to close down the shop. Ext.R1(c) dated 28.9.2007 is copy of that decision.

5. On considering the Writ Petition for admission and on hearing the submissions of Mr.V.Venugopalan Nair, counsel for the petitioner that perishable fruits are stored inside the shop room, I on 1.10.2007 passed an order directing the Secretary of the Municipality to open the shop room in the presence of the petitioner so as to enable the petitioner to take up all perishable goods therein and thereafter to close the shop room again. Subsequently on 4.10.2007 on hearing the complaint of Mr.Venugopalan Nair that the Municipality had ignored my order dated 1.10.2007 and considering the fresh affidavit dated 3.10.2007, I passed the following interim order:

"Sri.B.Sureshkumar, enters appearance on behalf of the Municipality. He seeks a short time to file counter affidavit. Counter, if any, shall be filed by 08.10.07. The Municipality will open the petitioner's bunk shop today at 5 P.M., so as to enable the petitioner to take out all his perishable goods including the fruits from the shop

room. Both sides take notice of this order. If the petitioner is present at 5 P.M., by his shop, the Municipality will open the shop room and permit the petitioner to take all the perishable goods out. After the goods are taken out, the shop will be closed."

It has not been alleged thereafter by the petitioner that the Municipality has not complied with the order dated 4.10.2007 and I have reason to believe that the version of the petitioner that perishable fruits worth several thousands of rupees remain stored inside the shop room which was overlocked by the Municipality is a highly exaggerated one.

6. Mr.V.Venugopalan Nair, counsel for the petitioner addressed me very strenuously and to a certain extent emotionally. Though the learned counsel went to the extent of submitting that the action of the Municipality in closing down the shop room at a time when the statutory tribunal and its own Council are in seizin of appeals preferred in response to this court's directions amounts to contempt of this court's directions, I am not inclined to accept that submission. The closure of the shop room was effected at a time when there was no order by this court, the statutory tribunal, the 2nd respondent and for that matter any other competent authority staying the

implementation of Ext.P6.

7.The legal ground seriously urged before me by Mr.Venugopalan Nair, i.e. licence is not necessary for fruit trade was one based on the judgment of this court in **Shaji v. State of Kerala** (2004(1) KLT 118). Section 447 of the Municipality Act as it obtains after the amendment by Act 14 of 1999 with effect from 24.3.1999 reads as follows:

> "447. Purpose for which places may not be used without licence - (1) A Municipality may notify by publication in the Gazette or in any other manner as may be prescribed that no place within the Municipal area shall be used for any one or more of the purposes specified (in the rules made in this behalf) or for any other trade without licence and except in accordance with the conditions specified therein and where the licence is for running hostels, restaurants, eating houses, coffee houses, Abkari shop, laundries, travel agency or barber saloons, the licence shall always contain and be deemed to contain a condition that admission or service therein shall be available to any member of the public:
>
> provided that no notification under this sub-section shall

take effect before the expiry of sixty days from the date of its publication."

The argument of the counsel was that the notification which has been published by the Municipality is not founded on any statutory rules framed by the Government and the learned counsel would place very strong reliance on the judgment of this court in **Shaji V. State of Kerala** (supra).

8. Mr.B.Sureshkumar, Standing Counsel for the Municipality would submit that the only contention of the petitioner earlier while he approached this court was that the Municipality has not issued any notification at all. Notification has been issued and going by that notification fruit stall is a trade for which licence is required. Referring to Section 575 of the Act, Mr.Sureshkumar submitted that the rules which regulated the issue prior to the commencement of the Municipalities Act, i.e., the Kerala Panchayat Raj (D &O) Rules, which are essentially rules for issuance of licence govern the field. To the above submission, Mr.Venugopalan Nair would reply by pointing out that even in the 6th Schedule to the Municipalities Act which has been substituted by Act 14 of 1999, fruit is not an item which required licence for trade. Mr.Sureshkumar would now submit that

on the language of the Section it is not obligatory that the notification should be founded on rules and that the view expressed in **Shaji v. State of Kerala**(supra) requires reconsideration.

9. Having considered the case, contentions and submissions, I am of the view that the petitioner is not entitled to contend before this court that there is no necessity for taking out a licence for conducting trade in fruits. He had raised such a ground in W.P.C.No.5328/07, but I did not approve that ground. Of course, in my judgment Ext.P4, there is no detailed consideration of that ground. But against Ext.P4, the petitioner preferred a Writ Appeal in which the most prominent and specific ground raised was the ground that there is no necessity to take out a licence and that I had erred in turning down the ground that the notification issued by the Municipality under Section 447 was not valid for want of rules in that regard. It is seen that the Division Bench has confirmed Ext.P4 in all respects which means that the above ground is concluded against the petitioner by principles of res judicata which include principles of constructive res judicata also.

10. It is true that in **Shaji v. State of Kerala** (supra) K.Balakrishnan Nair, J. has observed that in the absence of rules

framed under Section 447, there cannot be any levy of licence fee under that Section from private hospitals working in the municipal area. But on a careful reading of that judgment, it will be seen that the provision considered by the learned Judge was Section 447 of the Municipality Act as it stood prior to the amendment brought in by Act 14 of 1999 with effect from 24.3.1999. It was not argued before the learned Judge in that case that in terms of Section 447(1) as it obtains now, there can be no necessity for taking out licences for carrying out trades mentioned in the notification published by the Municipality unless rules framed by the Government in that regard insist on such licences. In the instant case, it is conceded that the Municipality has published a notification under Section 447(1) in the Gazette. It is also conceded that trade of fruit is specified as a trade requiring licence as per that notification. K.Balakrishnan Nair, J. was not called upon in **Shaji's** case to consider the scope of the words 'or for any other trade' appearing in Section 447(1) and, according to me, the judgment of the learned Judge in **Shaji's** (supra) cannot apply to the facts obtaining in the present case and to the arguments which are being considered in this case.

11. It is true that the heading of Section 447 speaks of

"purpose for which places may not be used without licence". But when one looks into the body of the Section, it is seen that the qualification "in the rules made in this behalf" provided through a parenthetical clause applies only to "purpose" and not to "other trades". There is discernible distinction between the words "purposes" and "trades" as they are used in the Section. No rules have been framed by the Government under Section 447 of the Municipality Act, it is conceded. Accepting Mr.Venugopalan Nair's argument that the qualification regarding rules applies to all trades would mean that collection of licence fees by the Municipalities all over Kerala from traders is illegal. When the legislature uses the words 'or any other trade' in the section, those words should be construed to have been used with a meaning and purpose. If the argument is to be accepted, it will have to be found that those words are redundant. Section 447(1) obviously empowers the Municipality to publish notifications either in the Gazette or by other modes. The argument that the power to decide upon the trades to be included cannot be left to the Municipality cannot be accepted when one considers the status assigned to the Municipality as a local self Government, in view of the Seventy-fourth Amendment of the

Constitution of India. Being a local self Government, the Municipality can be conceded the power to determine in public interest as to which all trades within its area there should be a levy of licence fee.

12. I have already found that it is not possible to say that the Municipality's action in closing down the petitioner's shop room by Ext.R1(c) does not amount to contempt of court authority of this court and for that matter the Tribunal. At the same time, it appears, having gone through the entire materials placed on record including the photographs produced by the Municipality and the photographs produced by the petitioner during the course of the hearing, that somebody in the Municipality is over-enthusiastic about the proposal to have the shop room removed even if it be by frustrating the statutory remedies already availed by the petitioner pursuant to this court's orders. After all, the order of demolition on the ground that building has been unauthorisedly renovated has been stayed by the Tribunal. To deny licence on that ground and to enforce closure of the premises wherefrom the petitioner, a small time trader has been eking out his livelihood does not appear to be very fair or just on the part of the Municipality. The petitioner is also a member of the 1st respondent's citizenry. At least, till such time as Ext.P8 appeal which

is a statutory appeal is disposed of, respondents 1 and 2 should have permitted maintenance of status quo regarding the petitioner's business.

13. I would have been inclined to direct the second respondent to take an early decision on Ext.P8 appeal directing maintenance of status quo ante as regards the conduct of business by the petitioner. But I find that the counter affidavit in this case has been filed by none other than the Chairman of the 1st respondent-Municipality before whom only Ext.P8 appeal was submitted by the petitioner. The petitioner's apprehension that he may not get a fair deal at the hands of the 2nd respondent presided over by the Chairman who has sworn to the counter affidavit cannot be said to be totally unfounded. The special circumstances attending on this case will justify consideration and disposal of the appeal Ext.P8 by the Tribunal for Local Self Government Institutions. Under these circumstances, the Writ Petition will stand disposed of with the following directions:

The appeal filed before the Council will be made over to the Tribunal for Local Self Government Institutions. The Tribunal will consider this appeal along with the appeal already preferred by the petitioner against the order of demolition and dispose of both the

appeals together. The 1st respondent is directed to open the bunk-shop in question and facilitate conduct of trade in fruits by the petitioner by issuing a provisional licence in that regard to the petitioner. It is made clear that this judgment is not a reflection on the merits of the grounds raised by the petitioner in the appeal already filed by him against the demolition order or in the appeal filed by him before the Municipal Council which is now ordered to be made over to the Tribunal. The direction regarding provisional licence is being issued lest the conduct of business by the petitioner should be otherwise illegal. The Tribunal will take an early decision on the two appeals and dispose of them in accordance with law at the earliest and at any rate within three months of receiving the appeal presently pending before the Council by transfer pursuant to this judgment.

srd **PIUS C.KURIAKOSE, JUDGE**